NO. 86-1392

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1986

GERALD SAJER, MAJOR GENERAL (PA)
THE ADJUTANT GENERAL, COMMONWEALTH
OF PENNSYLVANIA, et al.,
Petitioners

v.

ULUS JORDEN, JR.,
Respondent

REPLY TO FEDERAL RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

LeROY S. ZIMMERMAN
Attorney General

BY: THOMAS M. CROWLEY
Deputy Attorney General
Counsel of Record

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Counsel for Petitioners

Office of Attorney General
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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ARGUMENT

I. A. In the petition for writ of certiorari, we demonstrate why the Court of Appeals' decision allowing any direct suit against military superiors for injunctive relief cannot be reconciled with either the specific holdings or rationale of this Court's cases, and conflicts with decisions of other Courts of Appeals. In opposition to the petition, the federal respondent[1] contends that we have adopted the "extreme

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[1]The Federal co-defendant Emmett Walker is a respondent here because he neither joined Sajer's petition nor filed one on his own behalf. (Resp. Br. at 3, n. 1). Respondent Jorden has not filed a brief in opposition to the petition, nor has he filed a cross-petition on his claim for damages.

position" (Resp. Br. at 5) that military service personnel are barred from all equitable relief in federal court for alleged constitutional violations, a view which they argue was properly rejected by the Court of Appeals. Respondents argue that under the "exceptional circumstances" of this case (Resp. Br. at 8), the Court of Appeals acted reasonably "in permitting Jorden to bring his constitutional claims directly in federal court" (id.), and that this case does not conflict with Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986) (Resp. Br. at 9, n. 4).

B. Respondent begins by arguing that petitioner advocates the "extreme" position that servicemen are

barred from obtaining any equitable relief in federal court. (Resp. Br. at 5). Initially, it must be noted that opposition to the Court of Appeals' determination that any injunctive action can be brought does not entail, either logically or legally, the corollary that no such action can be brought, and petitioners nowhere argue for this in their petition. Moreover, the issue in this case is direct action against military superiors, not those classes of cases which involve reviews of intra-military tribunals and boards or facial challenges to statutes or regulations. As respondent concedes, Resp. Br. at 7-8, this Court allows such direct challenges in only a "limited category of cases" involving facial attacks on military statutes or regulations, and that such claims as respondent Jorden

seeks to bring "would undermine the system of remedies established by Congress within the armed forces." In our view, these are the limits of permissible injunctive relief.

C. Respondent appears to argue that the Court of Appeals' decision is somehow sanctioned by the language in Chappell v. Wallace, 462 U.S. 296, 304 (1983) stating that "[t]his Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." The Court of Appeals recognized that Chappell makes no direct references to claims for injunctive relief, (Pet. App. 69a) and that its decision was being made in the

absence of a decree from this Court. (Pet. App. 76a-77a). Nevertheless, the decision of the Court of Appeals is plainly incompatible with the decisions of this Court relating to suits against the military. Petitioner will not repeat the cases and argument in their original petition (Pet. at 24-30), but note that just this term, the doctrine of Feres v. United States, 340 U.S. 135 (1950) was reaffirmed by this Court in United States v. Johnson, No. 85-2039 (May 18, 1987). Specifically stated as a basis for the continuing vitality of that doctrine is the unique nature of the military, which "must foster instinctive obedience, unity, commitment and esprit de corps," and must have discipline which "involves not only obedience to orders, but more generally duty and

loyalty." Johnson, slip op. at 9-10. See also Goldman v. Weinberger, No. 84-1097 (March 25, 1986); United States v. Shearer, 473 U.S. 52 (1985); Parker v. Levy, 417 U.S. 733 (1974). It is clear that the continued vitality of Feres and the Feres rationale is incompatible with the decision of the Court of Appeals allowing any and every injunctive action to be brought against military superiors.

D. Respondent also mischaracterizes this case, and in so doing fails to perceive the true impact of the Court of Appeals' decision. The truly extreme position is that of the Court of Appeals, which would allow a direct action by military personnel against their superiors in federal court at any time, so long as those actions are labeled "injunctive"

rather than as claims for damages. As pointed out by petitioners, Pet. at 23-24, the distinction drawn by the Court of Appeals between damages actions and injunctive claims is wholly untenable, resting as it does on the proposition that damage awards present a threat to vigorous decision making and an intrusion into military discipline that injunctive actions do not. One need only consider the prospect of service personnel seeking temporary restraining orders or preliminary injunctions to block the enforcement of orders sending personnel into combat to realize that injunctive actions are in fact likely to be more, rather than less, intrusive.

E. Respondent does not address the wholly standardless nature of the Court of Appeals' decision or the unfounded distinction on which it is based.

Rather, he focuses on what he characterizes as the "exceptional" circumstances of this case, circumstances which are claimed to justify the Court of Appeals' decision. (Resp. Br. at 8).

Contrary to respondent's characterization, no "exceptional" circumstances are presented by this case, nor did the Court of Appeals take itself to be deciding a fact-specific case which would give rise to a narrow result.[2] In fact, this case is all too typical, a typicality which only serves to emphasize the sweeping nature of the Court of Appeals' decision. The fact that respondent Jorden seeks reinstatement to both

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[2]Indeed, in that this case was disposed of on a motion to dismiss in the trial court the only facts presented are those of the amended complaint which must be taken as true in the current procedural posture of this case.

the state guard and to his civilian technician employment, relief which the Air Force Board for the Correction of Military Records may not be able to order,[3] plainly constitutes the typical case for a member of a National Guard unit who holds dual federal and state status as well as his technician employment, and seeks injunctive relief after discharge. Moreover, this case arises from the most basic of military actions: the disciplining of a subordinate for failing to obey a facially valid

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[3]In this regard, the unstated assumption of the Court of Appeals that petitioners would not take the appropriate action to reinstate Jorden even if he were successful before the AFBCMR, simply because the Board cannot order such action, is unwarranted.

order given by a superior. There is simply nothing "exceptional" about the facts of this case.

What is exceptional is the legal analysis of the Court of Appeals, an analysis which allows military personnel to file an action seeking injunctive relief against their superiors, no matter how intrusive such an action would be, and regardless of whether any regulations are challenged or administrative remedies exhausted. Such a holding, arising in the context of so basic a military situation as that presented by this case, is of vital significance to every National Guard unit. Because it is both grounded on an untenable distinction between damages actions and claims for injunctive relief, and is inconsistent with the

specific holdings and overall intent of this Court's cases, this Court should grant the writ.

II. Respondent contends, Resp. Br. at 9, n. 4, that the decision in Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986) is not inconsistent with the decision of the Court of Appeals in this case. Respondents properly point out that plaintiffs in Crawford sought not only reinstatement in the TARNG, but also correction of their military records and eligibility for retirement benefits without any recourse to the Army Board, and that the Fifth Circuit dismissed the action pending exhaustion. Nevertheless, the Fifth Circuit refused to allow precisely the type of action permitted by the Court of Appeals in this case: a direct

action against military superiors seeking injunctive relief for actions taken by those superiors. What equitable relief the Fifth Circuit would allow was limited to a review "of any future actions taken by the Army Board." Crawford, 794 F.2d at 1037. This is a far more limited provision for injunctive relief than the standardless result in the present case. These cases are incompatable in that they sanction wholly different avenues of redress for service personnel. The federal nature of the National Guard, and the Guard's presence in every state, demands more consistency than these cases provide.

At a minimum, the decision of the Court of Appeals has rendered the intra-military system of review and remedies superfluous, and lacks even the

flexible standards of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971) for regulating injunctive actions by military personnel.[4] Contrary to respondent, Rep. Br. at 11, there are more than adequate grounds for calling into question the Court of Appeals' decision, and sufficiently important issues to warrant this Court's consideration.

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[4]The respondent's characterization of the Third Circuit's standard as only "somewhat different" from the Mindes test fails to recognize that the decision of the Court of Appeals in this case has as its only "standard" whether the complaint is labeled as an injunctive action, and requires neither the exhaustion of intra-service remedies nor the analysis and balancing of factors required by Mindes.

CONCLUSION

For these reasons, and the reasons expressed in the petition for writ of certiorari, the petition should be granted and, upon review, the decision of the Court of Appeals should be reversed and judgment entered for petitioners on the claims for injunctive relief.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: THOMAS M. CROWLEY
Deputy Attorney General
Counsel of Record

JOHN G. KNORR, III
Senior Deputy Attorney General

ANDREW S. GORDON
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

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